BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD GREEN Claimant VS. **EATON CORPORATION** Respondent Self-Insured	)	Docket No. 170,646

AWARD

On the 11th day of October, 1995, the application of the respondent for review by the Kansas Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson on June 5, 1995, came regularly on for oral argument in Wichita, Kansas.

ISSUES

Claimant appeared by and through his attorney, Mr. James Zongker, appearing for David H. Farris of Wichita, Kansas. Respondent, Eaton Corporation, a qualified self-insured, appeared by and through their attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What, if any, is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, an employee of Eaton Corporation, suffered injury to his lower back on July 18, 1991. As a result he underwent a fusion at L5-S1 with Dr. Michael P. Estivo. Claimant's

fusion failed, unfortunately, leaving claimant with significant difficulties including left lower extremity radiculopathy and ongoing pain.

A dispute exists between respondent and claimant as to whether respondent offered claimant appropriate employment at a comparable wage within claimant's restrictions, resulting in claimant losing entitlement to an award of work disability pursuant to K.S.A. 1991 Supp. 44-510e(a). Respondent bases this contention upon a job offered to claimant in October, 1993 which fell within the restrictions placed upon claimant by Dr. Estivo in 1992 and 1993. Claimant, having performed the job in the past, rejected respondent's offer contending that he was physically incapable of performing the job duties with his ongoing symptomatology.

After additional testing confirmed claimant's fusion had failed, Dr. Estivo placed additional restrictions upon claimant's ability to perform work in the open labor market. These additional restrictions placed upon claimant in 1995 would preclude claimant from performing the job offered by respondent in 1993. Respondent argues claimant was unaware of the additional restrictions by Dr. Estivo at the time the job offer was made and, pursuant to Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), claimant should be denied work disability at least through the date Dr. Estivo added the additional restrictions to claimant.

The Appeals Court, in Foulk, found that to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable when a proffered job is within the worker's ability and the worker has refused to even attempt the job.

> "The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage." Id. 284.

It was significant to the Court of Appeals that claimant be capable of engaging in work within claimant's restrictions when considering the offered job. In this instance, while the circumstance is extremely unusual, it appears as though claimant's ability to perform the job offered, as assessed by claimant's ability to understand his own physical limitations, was more accurate than that of the treating physician until such time as the treating physician re-evaluated claimant's physical impairment. It is rare that a health care provider is accurately second guessed by his own patient. In this instance, Dr. Estivo was unaware in 1992 that claimant's fusion had failed. Not until additional tests were performed several years later did the claimant's additional limitations become apparent to Dr. Estivo. In this instance, claimant refused to perform a job that, while within the restrictions placed upon him by the treating physician, was outside of his own physical ability to perform. The Appeals Board acknowledges this unusual circumstance, particularly as claimant's refusal to perform this job was later supported by the test results showing the failed fusion.

The Appeals Board finds that claimant's refusal to attempt the job, when offered in 1992, was reasonable under these circumstances and will not, even in considering the logic of Foulk, result in claimant being denied work disability in this instance.

The Appeals Board, in considering the Award of the Administrative Law Judge, finds that it is well supported factually and legally, and the opinion of the Administrative Law Judge fully expresses the opinion of the Appeals Board in granting claimant work disability in this matter and the Appeals Board adopts said Award in toto as its own. The Appeals Board, therefore, awards

claimant a sixty percent (60%) permanent partial general body work disability as a result of the injuries suffered July 18, 1991.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that claimant, Donald Green, is granted an award against the respondent, Eaton Corporation, a qualified self-insured, and finds the Award of the Administrative Law Judge George R. Robertson dated June 5, 1995, shall be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director